

Restructuring & Insolvency 2021

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Restructuring & Insolvency 2021

Contributing editors**Catherine Balmond and Katharina Crinson**Freshfields Bruckhaus Deringer

Lexology Getting The Deal Through is delighted to publish the 14th edition of *Restructuring & Insolvency*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ireland and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine Balmond and Katharina Crinson of Freshfields Bruckhaus Deringer, for their assistance with this volume.



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GENERAL

Legislation

- 1 | What main legislation is applicable to insolvencies and reorganisations?

In Thailand, the Bankruptcy Act BE 2483 (AD 1940) as amended (the BA) is the main law governing bankruptcy and reorganisation matters. Bankruptcy and reorganisation procedural matters are covered by the BA, the Establishment of and Procedures for Bankruptcy Court Act BE 2542 (AD 1999) (the EPB), and the Regulations for Bankruptcy Cases BE 2549 (AD 2006).

Excluded entities and excluded assets

- 2 | What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

Bankruptcy

According to section 7 of the BA, the court may order that an insolvent debtor be declared bankrupt if the debtor is domiciled in Thailand or has operated its business in Thailand within one year prior to the date that a bankruptcy case is filed with the court.

Section 9 of the BA specifies that a creditor can file a bankruptcy case against a debtor if certain conditions are met. One of the conditions is that a juristic person is required to have indebtedness owing to one or more creditors of not less than 2 million baht in total. Therefore, an entity, including a foreign entity, that meets the above requirements may be declared bankrupt by the Thai courts.

Reorganisation

Previously, only a debtor that was a limited company or public limited company or another juristic person included by ministerial regulations (the Credit Union Cooperative was one such example) could file for reorganisation or be subject to involuntary reorganisation under the BA. In 2016, an amendment to the law allowed natural persons and other juristic persons to enter into reorganisation proceedings, if they can be categorised as small to medium enterprises (SMEs) under the SMEs promotion laws.

Assets excluded from bankruptcy proceedings are personal and necessary assets that the debtor, his or her spouse and his or her minor children reasonably require in accordance with their condition in life; and livestock, seeds, instruments and items for use in the debtor's occupation, of a total value not exceeding 100,000 baht.

Public enterprises

- 3 | What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

There is no specific procedure for the insolvency of a government-owned enterprise.

There is no special remedy for creditors of an insolvent public enterprise.

Protection for large financial institutions

- 4 | Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

No. However, under the Financial Institution Business Act, before a commercial bank, finance company or credit foncier company enters into reorganisation proceedings, the Bank of Thailand may take control of the financial institution and replace management with a control committee. Similar control mechanisms are applicable to insurance companies and securities companies under the Life Insurance Act, the Non-Life Insurance Act and the Securities and Exchange Act.

Courts and appeals

- 5 | What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Central Bankruptcy Court, the Regional Bankruptcy Court, the Court of Appeal for Specialised Cases and the Supreme Court, Bankruptcy Division, are the specialised courts that have jurisdiction to adjudicate bankruptcy and reorganisation matters.

In bankruptcy and reorganisation proceedings, there are three levels of court. At the first level, the (Central or Regional) Bankruptcy Court is the court of first instance. Any appeal against either the judgment or order (or both) of this court can be made to the Court of Appeal for Specialised Cases, subject to certain restrictions. If a party is dissatisfied with the judgment or order of the Court of Appeal for Specialised Cases, he or she may further appeal against the judgment or order to the Supreme Court, subject to certain restrictions, by submitting a request to appeal to the Supreme Court.

Pursuant to the EPB, a judgment or order of the (Central or Regional) Bankruptcy Court in respect of bankruptcy or business reorganisation cannot be appealed against unless the judgment or order is for:

- dismissal of a petition for bankruptcy;
- dismissal of a petition for business reorganisation;
- approval or disapproval of repayment of debt, either in whole or in part;

- absolute receivership; or
- civil cases relating to bankruptcy proceedings.

The Court of Appeal for Specialised Cases may grant leave to appeal in other cases if it finds that the request for appeal is in the interest of justice.

In addition, the judgment or order of the Court of Appeal for Specialised Cases may be further appealed against to the Supreme Court, within one month of the date of judgment or order, by requesting leave to appeal from the Supreme Court, subject to the conditions and requirements as prescribed by the Civil Procedure Code (as amended). The grounds for appeal to the Supreme Court include important legal issues decided by the Court of Appeal for Specialised Cases that conflict with precedents of the Supreme Court or have never been decided by the Supreme Court.

There is no requirement to post security to proceed with an appeal in such cases.

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

- 6 | What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Thai law does not allow voluntary bankruptcy to be commenced by the debtor, except that if a liquidator in the course of winding up a debtor finds that the debtor has insufficient assets to settle all debts, the liquidator must file a bankruptcy petition.

Voluntary reorganisations

- 7 | What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

To commence a voluntary reorganisation, a debtor must be insolvent or unable to pay its debt as they fall due and owe a definite amount not less than 10 million baht to one or more creditors. Once the reorganisation petition is accepted by the court, there will be a stay on proceedings against the debtor and other measures affecting the assets of the debtor by virtue of section 90/12 of the Bankruptcy Act (the BA).

Successful reorganisations

- 8 | How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

A reorganisation plan must be approved by resolution of the creditors' meeting. Section 90/42-bis of the BA provides a voting system whereby creditors are divided into the following groups or classes:

- each secured creditor having a secured debt of not less than 15 per cent of the total debt for which a claim for repayment may be filed will constitute one group, while other secured creditors will constitute another group;
- unsecured creditors may be divided into different groups, but unsecured creditors who have the same or similar rights or benefits will form one group; and
- creditors that, by the law or contract, are entitled to receive payment only after other creditors have received payment in full will form one group.

The reorganisation plan must be approved by either:

- a resolution of each group of creditors by a majority in number of each group of creditors holding an amount of not less than

two-thirds of the total debts of that group of creditors who are present at the meeting, in person or by proxy, and cast their votes; or

- a resolution of at least one group of creditors by a majority in number of the group of creditors holding an amount of debts of not less than two-thirds of that group of creditors who are present at the meeting, in person or by proxy, and cast their votes, and, when counting the total amount of debts owed to all creditors who approved the reorganisation plan, the amount is not less than 50 per cent of the total debts owed to all creditors who are present at the meeting, in person or by proxy, and cast their votes.

In addition, the reorganisation plan must be confirmed by the court. The reorganisation plan confirmed by the court will bind both creditors that have submitted an application for debt repayment and those that have not submitted such an application but could have done so.

A reorganisation plan cannot release non-debtor parties from any liability arising prior to the date of approval of the plan.

Involuntary liquidations

- 9 | What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Under section 9 of the BA, any creditor is eligible to file for bankruptcy against a debtor.

To do so, the debtor must be proved to be indebted to one or more creditors in the amount of at least 1 million baht in total (in the case of a natural person) or indebted to one or more creditors in the amount of at least 2 million baht in total (in the case of a juristic person), and to be insolvent.

Once the court issues an order for absolute receivership against the debtor, the debtor is barred from managing its own business and assets, and management powers are transferred to the official receiver.

Involuntary reorganisations

- 10 | What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

A single creditor or a group of creditors may file a reorganisation petition against a debtor if the debtor is insolvent or unable to pay its debts as they fall due, and owes a definite amount of not less than 10 million baht, to one or more creditors. A state agency authorised to supervise the business of the debtor as prescribed by the BA (eg, the Bank of Thailand or the Securities and Exchange Commission) may also file such a reorganisation petition. Once the reorganisation petition is accepted by the court, there will be a stay on proceedings against the debtor and other measures affecting the assets of the debtor by virtue of section 90/12 of the BA.

Under the BA, there are no material differences between reorganisation proceedings opened voluntarily and involuntarily.

Expedited reorganisations

- 11 | Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Thai law does not expressly provide for an expedited reorganisation procedure but, in practice, the time-consuming nature of certain stages of the reorganisation can be reduced by having the debtor and major creditors agree on the principles of the reorganisation plan prior to the application for reorganisation.

Unsuccessful reorganisations

12 | How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

If the reorganisation plan is not approved by the creditors or is approved by the creditors but not confirmed by the court, the court will then cancel the reorganisation order. Upon the cancellation of the reorganisation order, the automatic stay will end and the powers and duties in managing the debtor's business and assets will revert to the debtor's executives, but any acts done by the official receiver, interim executive or the plan preparer before the order is cancelled will not be affected. The debtor's shareholders will also again enjoy their normal legal rights.

If the reorganisation is not successfully implemented in accordance with the reorganisation plan and the maximum period prescribed under the BA has elapsed, the court will either make an order to terminate the debtor's reorganisation, or make an absolute receivership order if the court considers that the debtor should be declared bankrupt.

Corporate procedures

13 | Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Yes. The liquidation of a company is governed by the Civil and Commercial Code and the BA. If a company wishes to enter into a solvent liquidation in a normal situation, the company must call a shareholders' meeting to approve the liquidation by a three-quarters majority of shareholders voting and appoint a liquidator to settle the affairs of the company, to pay its debts and distribute its assets.

If the liquidator of the company finds that, after all shares have been paid up in full, the company's assets are insufficient to meet its liabilities, the liquidator must apply at once to the court to have the company declared bankrupt.

Conclusion of case

14 | How are liquidation and reorganisation cases formally concluded?

Bankruptcy proceedings are concluded according to section 133 of the BA. Once the official receiver has made the final distribution of the assets of the debtor, or has ceased to take action under a composition, or when the debtor has no remaining distributable assets, the official receiver can prepare a report of the business and accounts of receipts and expenditures, submit these to the court and request a court order for closure of the case.

Reorganisation proceedings are concluded according to section 90/70 of the BA if the debtor's executives, plan administrator, interim plan administrator or the official receiver, as the case may be, considers that the reorganisation of the business has been successfully completed pursuant to the plan. He or she must promptly report to the court and request the court to issue an order to terminate the reorganisation. The court will make such an order if it considers that the company has successfully implemented the plan.

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

15 | What is the test to determine if a debtor is insolvent?

The test of insolvency is mainly whether a debtor has liabilities greater than its assets. Under section 8 of the Bankruptcy Act, there are certain

facts that create a presumption that the debtor is insolvent; for example, if a debtor fails to pay two demands for payment with an interval of not less than 30 days between them or a debtor transfers its assets or creates any right over its assets that, if the debtor were a bankrupt, would be deemed as an act of preference. These facts only create a presumption, which the debtor is entitled to rebut by proving that it is solvent. In practice, debtors would have to prove that they have assets of value that exceeds their liabilities by referring to their audited accounts. The petitioning creditor may then try to challenge the valuations shown in the accounts.

The debtor needs to be insolvent for a bankruptcy filing to succeed, but the grounds for a reorganisation petition include not only the insolvency of the debtor but also the inability of the debtor to pay its debts as they fall due.

Mandatory filing

16 | Must companies commence insolvency proceedings in particular circumstances?

There is no Thai law that requires directors to commence bankruptcy or reorganisation proceedings. However, the board of directors has a duty to call an extraordinary general meeting of shareholders when the company has made a significant loss (ie, a loss equal to a half of the company's capital).

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

17 | If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

There is no liability for directors and officers resulting from the failure to commence proceedings, as this is not required under Thai law. However, should a company's board of directors fail to call an extraordinary general meeting of shareholders to assess the company's loss when it has lost half of its capital, each director may be held criminally liable with a penalty of up to 20,000 baht under the Act on Offences Concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations BE 2499 (AD 1956).

Companies are not prohibited from carrying on business while insolvent. However, if an unsecured creditor knows that a company (debtor) is insolvent at the time and yet still allows the debts to be created, the creditor cannot claim for those debts in subsequent insolvency proceedings unless the debts were created so that the debtor's business could continue its operation (Bankruptcy Act, section 94(2)).

Directors' liability – other sources of liability

18 | Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Under Thai law, directors and officers are not liable for their corporation's liabilities under section 820 and 1167 of the Civil and Commercial Code (the CCC). However, the directors and officers of the corporation might be liable to the corporation's creditors for damages incurred by the creditors if, for example, they act fraudulently.

A director and officer may be subject to criminal liabilities if their actions or inactions result in the company committing a criminal offence.

Directors' liability – defences

19 | What defences are available to directors and officers in the context of an insolvency or reorganisation?

There are no defences, as there is no liability.

Shift in directors' duties

20 | Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No; the likelihood of insolvency or reorganisation proceedings does not cause a shift in the directors' duties.

Directors' powers after proceedings commence

21 | What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After insolvency proceedings are commenced by or against the debtor, the directors and officers can still exercise their powers to manage their corporation's business until, in the case of bankruptcy, the court orders the debtor to be under receivership, when the directors' powers cease and are, by virtue of law, transferred to the official receiver. Pursuant to section 826 of the CCC, the powers of the officers empowered by the directors to act as an agent of the debtor will also terminate once the debtor becomes bankrupt. However, the officers (agents) are obligated to take all necessary steps to protect the interests entrusted to them until the representatives of the principal can protect such interests.

In reorganisation proceedings, after the court makes an order for a business reorganisation, the powers and duties of the debtor's executives in managing the business and assets of the debtor will cease and will be transferred to the interim executive, the receiver or the plan preparer, and after the plan has been approved, to the plan administrator. This situation will continue until the termination of the plan following its successful completion or other termination of the reorganisation.

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

22 | What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

In a bankruptcy case, the Bankruptcy Act (the BA) does not specifically provide for the application of an automatic stay. If the court has not yet issued an absolute receivership of the debtor's assets, its creditors may still file civil complaints in relation to debts for which claims could be made in the bankruptcy. In addition, pending cases involving assets of the debtor under bankruptcy proceedings may be suspended at the court's discretion.

In a reorganisation, an automatic stay applies upon the court's receipt of the petition for business reorganisation. Thereafter, the creditors cannot file civil complaints, or enforce judgements, against the debtor if the relevant debts arose prior to the date of the court's approval of the plan. In addition, pending cases are suspended. However, the creditors can apply to the court for relief from such restrictions if the restrictions are not necessary for the debtor's reorganisation, or do not provide sufficient protection for secured creditors.

During the automatic stay, enforcement is possible against perishable property, or in cases where delays in enforcement might cause

loss to the property or incur costs that might exceed the value of the property. The property will be sold via auction and the proceeds will be delivered to the plan administrator on its appointment. If a reorganisation plan has not been approved by the court, secured creditors can enforce their relevant security after one year from the date of receipt of the petition for business reorganisation. That period can be extended twice, for not more than six months each time.

Doing business

23 | When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

If the debtor is being liquidated because of bankruptcy, the official receiver on behalf of the debtor can only continue the debtor's business strictly for the purpose of finishing up its remaining businesses.

In a reorganisation, the debtor is allowed to continue carrying on its normal business operations pursuant to section 90/12(9) of the BA. However, the powers and duties of the debtor's executives in managing the business and assets cease once the court has made a reorganisation order, when the court will appoint a person or persons (which may include former executive(s) of the debtor) to be an interim executive until the plan preparer is appointed. The debtor's assets cannot be sold except in the normal course of business unless the sale is approved by the court. The debtor is allowed to make payments to creditors that supply goods or services according to normal and current terms and conditions of agreements. Any claims arising after the court's reorganisation order will not be subject to the reorganisation proceedings, and if the debtor has incurred such obligations in the normal course of business and as required for the continuation of its operations, the debtor can pay such claims.

Creditors of debts created by the official receiver or interim executive with a debt confirmation letter from a plan preparer and creditors of debts created by the plan preparer, plan administrator, interim plan administrator or official receiver have the right to be repaid without having to file a claim for payment in the reorganisation.

If the reorganisation plan is successfully implemented and the court orders the termination of the reorganisation process, the debts of the creditors who supplied goods and services after the court's order for business reorganisation (if those debts were created by the plan preparer, plan administrator, interim plan administrator or official receiver) will be treated as first-rank privileged debt, which are ranked higher than general unsecured creditors.

On the other hand, if the reorganisation plan fails and the court orders the absolute receivership of the debtor, such debts will also rank equally with the expenses incurred by the official receiver in the liquidation of the assets of the debtor, and so rank higher than the unsecured creditors.

If the creditors approve the reorganisation plan, they can be represented by a creditors committee to be selected at a creditors' meeting. The creditors' committee will supervise the implementation of the plan by the plan administrator.

Post-filing credit

24 | May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

In bankruptcy proceedings, when the court has ordered the debtor to go into receivership, the debtor is prohibited from incurring any additional debt without the leave of the court or official receiver. Any transaction

in breach will be void. However, the official receiver can borrow to complete unfinished contracts, and that debt will constitute the official receiver's expenses, which have priority over unsecured creditors.

In reorganisation proceedings, the debtor is able to borrow with the approval of the court or if the borrowing is included in the reorganisation plan. Such debt will have priority over pre-reorganisation debt.

Sale of assets

25 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

In bankruptcy proceedings, under section 24 of the BA, after the court's receivership order, the debtor is prohibited from engaging in any activity involving his or her assets, including sale of the assets, unless the sale is approved by the court, the official receiver, the administrator of the assets or of a creditors' meeting. The official receiver is generally the only person permitted under the BA to sell the assets of the debtor. The sale of assets will be conducted through auction or other selling methods proved to be the most convenient and in the best interests of all creditors as stipulated in section 123 of the BA. The claims and liabilities can be passed with assets depending on the terms and conditions of the sale.

In reorganisation proceedings, under section 90/12(9) of the BA, the debtor is also prohibited from selling the assets out of the ordinary course of business throughout the process, unless otherwise provided in the reorganisation plan or approved by the court.

Negotiating sale of assets

26 Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

'Stalking horse' bids and credit bidding are not specifically prohibited under Thai law.

Rejection and disclaimer of contracts

27 Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

In the case of bankruptcy, section 122 of the BA specifies that the official receiver has the power to disclaim an unfavourable contract. This power must be exercised within three months of the date the official receiver realises that the contract is unfavourable. A party affected by the disclaimer is entitled to file an application for debt repayment in the bankruptcy proceedings. Any claim for damages arising as a result of a breach of such a contract can be made against the debtor only if the court has not yet issued an order for absolute receivership of the debtor.

Under section 90/41-bis of the BA, only the plan administrator has the power to disclaim an unfavourable contract as specified in the reorganisation plan. The disclaimer must be exercised within two months of the date on which the court approves the plan. Whoever suffers damage as a result will have the right to file an objection with the court within 14 days of becoming aware of the disclaimer. If the court reaffirms the disclaimer, whoever suffers damage as a result will be entitled to claim for the resulting loss in the reorganisation proceedings.

Once the court issues an order accepting a reorganisation petition, section 90/12 of the BA prohibits the creditors from commencing a civil case in respect of the assets against the debtor if the obligation arises before the day on which the court approves the plan. If a breach of contract occurs, the creditors can choose to take legal action to claim for damages arising as follows:

- if the breach occurs before the court issues the reorganisation order, creditors can file a claim in the reorganisation with the official receiver;
- if the breach occurs after the day on which the court issues the reorganisation order but before the day on which the court approves the reorganisation plan, the creditors can ask the court for permission to take action against the debtor in a civil case; or
- if the breach occurs after the day on which the court approves the reorganisation plan, the creditors can take action against the debtor in a civil case without having to seek permission from the court.

Intellectual property assets

28 May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

There is no specific provision under the BA for termination of IP usage rights or the extent of IP usage during bankruptcy or reorganisation proceedings. Accordingly, the termination of IP usage or the extent of IP usage is governed by the terms of the agreement between the licensor and the licensee.

Personal data

29 Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

There is no specific provision under the BA to restrict the use of personal information or the collection of customer data of an insolvent company.

However, the Personal Data Protection Act (the PDPA) is scheduled to come into effect in May 2021. The PDPA applies to the collection, use or disclosure of personal data in Thailand. As personal information and customer data are generally considered personal data under the PDPA, its use and transfer after the PDPA comes into effect will be governed by the PDPA, and will generally not be possible without the consent of the relevant persons.

Arbitration processes

30 How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Arbitration is not used in liquidation or reorganisation proceedings.

CREDITOR REMEDIES

Creditors' enforcement

31 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

There is no process by which some or all of the assets of a business may be seized outside of court proceedings.

Unsecured credit

- 32 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Remedies available to unsecured creditors include obtaining interim injunctions to prevent the debtor disposing of its assets, or a final court judgment to request for properties of the debtors to be seized and sold in public auction. Obtaining a final court judgment in order to proceed with requesting the Legal Execution Department to seize the debtors' properties to be sold in public auction is time-consuming and could take over five years.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

- 33 During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

In bankruptcy proceedings, the following notices are required to be given to creditors:

- notice of the deadline for submission of debt repayment claims;
- notice to convene the first creditors' meeting;
- notice to convene the creditors' meeting to consider any composition before or after the debtor is declared bankrupt; and
- notice of the court hearing for the consideration of any composition.

In reorganisation proceedings, the following notices are required to be given to creditors:

- notice of filing of the business reorganisation petition;
- notice of the deadline for submission of debt repayment claims;
- notice to convene the first creditors' meeting to consider the proposed business reorganisation plan; and
- notice of the court hearing to consider the business reorganisation plan.

Certain information will be available to creditors or creditors' committees, for example, details of any composition and details of the debtor's estate and business. The official receiver has the duty to report to the court on the administration of the debtor's assets and the conduct of the bankrupt person. In a reorganisation, the plan administrator must report the progress of implementation of the plan to the official receiver every three months.

Creditor representation

- 34 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

In bankruptcy proceedings, under section 37 of the Bankruptcy Act (the BA), the creditors' meeting may pass a resolution to appoint a committee of creditors in matters relating to the management of the debtor's assets as prescribed in the BA.

In reorganisation proceedings, under section 90/55 of the BA, the creditors' meeting may pass a resolution to appoint a committee of creditors to act on behalf of all creditors in monitoring the implementation of the plan. In practice, a reorganisation plan may specify that proper expenses be paid to the advisers of the creditors.

Enforcement of estate's rights

- 35 If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

In bankruptcy proceedings, the official receiver is empowered by the BA to pursue the estate's remedies (rights to claim repayment or demand the delivery of an asset) against third parties. Under section 118 of the BA, the official receiver is entitled to submit a petition requesting the court to compel persons who admit that they are indebted to the debtor or have assets of the debtor in their possession, to pay the debt or turn over those assets. However, if such persons do not admit that they are indebted to the debtor or they have assets of the debtor in their possession, the official receiver will need to take any further actions in accordance with section 119 of the BA. The fruits of these remedies will be added to the debtor's pool of assets and distributed among the creditors.

In reorganisation proceedings, the plan preparer, the plan administrator and the official receiver have similar means of pursuing the estate's remedies under section 90/38 and 90/39 of the BA. Any amount obtained this way belongs to the debtor.

Individual creditors may not pursue the estate's remedies.

Claims

- 36 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

In bankruptcy proceedings, in general, all creditors must file an application for repayment of debt with the official receiver within two months from the date on which the court's receivership order is published in the Government Gazette (the period may be extended at the official receiver's discretion, in the event a creditor is domiciled outside Thailand, for a period not exceeding two months). If a creditor fails to file an application for repayment of debt, except for limited exceptions (eg, tax claims), the creditor will not be entitled to receive its share of the bankruptcy proceeds.

The official receiver must submit the applications for debt repayment of all creditors along with his or her opinion on their validity for the consideration of the court and whether the creditors will be granted repayment of the debt is at the court's consideration. If the creditors wish to object to the court's order, they may appeal to the Court of Appeal for Specialised Cases.

There is no specific provision under the BA that prohibits the transfer of claims. Transfers of claims are possible but subject to the discretion of the official receiver. Transfers of claims must be disclosed to the official receiver.

In reorganisation proceedings, all creditors must file an application for repayment of debt within one month of the publication of the order for appointment of the plan preparer in the Government Gazette. If a creditor fails to file an application for repayment of debt within this time period, it will not be entitled to receive payment under the plan and has no further recourse against the debtor, unless the reorganisation plan provides otherwise, or the court cancels the reorganisation order.

The official receiver has a duty to approve applications for repayment of debt, including for contingent or unliquidated amounts. Such contingent or unliquidated amounts will be determined by the official receiver based on evidence and the creditors' proof of claim. An interested person may appeal against the decision of the official receiver for the consideration of the relevant court within 14 days.

In general, the transfer of claims in reorganisation proceedings is subject to the discretion of the official receiver or the court, depending on the stage of the consideration of the application for repayment of debt.

Under Thai law, a claim acquired at a discount can be enforced for its full face value.

With regard to the calculation of interest, in bankruptcy proceedings, pursuant to section 100 of the BA, interest accruing after the date on which the court orders receivership cannot be claimed. In reorganisation proceedings, on the other hand, creditors are not prohibited from claiming interest accruing after the court order for reorganisation of the debtor's business up to the date of payment, but payment of interest will be subject to terms of the plan and may be severely restricted.

Set-off and netting

37 | To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

In bankruptcy proceedings, under section 102 of the BA, if a creditor who is entitled to claim for repayment of his or her debt is indebted to the debtor when the court issues the order placing the assets of the debtor under receivership, even if the grounds for the indebtedness of the two parties are not the same, or are subject to conditions or terms, the debts may be set off against each other, unless the creditor's right of claim against the debtor accrued after the order of receivership of the debtor's assets.

In reorganisation proceedings, under section 90/33, if a creditor who is entitled to apply for repayment of debt in the reorganisation is indebted to the debtor at the time of issuance of the reorganisation order, the creditor may exercise a right of set-off, unless the creditor acquires the claim against the debtor after the court issues a reorganisation order.

Set-off must be exercised at the time of claiming for debt repayment. A right to set-off may be excluded by contract.

Modifying creditors' rights

38 | May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

Under the BA, the court is unable to change the rank (priority) of a creditor's claim.

Priority claims

39 | Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Under Thai law, secured debts have priority over unsecured debts: no priority claims have priority over secured debts.

For unsecured debts, repayments will be distributed in the following order:

- expenses of administering the debtor's estate;
- expenses incurred by the official receiver in managing the debtor's assets;
- funeral expenses of the deceased debtor appropriate to his or her status;
- fees incurred in collecting assets;
- fees of the petitioning creditor and counsel's fee, as the court or the official receiver may prescribe; and
- taxes that have become due for payment within the six months prior to the order for receivership and amounts owing to employees

for service under the labour protection law within four months prior to the order for receivership and no more than 100,000 baht per employee.

These items rank ahead of ordinary unsecured creditors.

Employment-related liabilities

40 | What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Normal employee claims (eg, severance pay) will arise if an employment is terminated during the bankruptcy or reorganisation proceeding. The procedure for termination during the proceeding is in accordance with Thai labour laws. Also, employees' pension plans or schemes do not have any priority in the bankruptcy or reorganisation proceedings in Thailand.

Pension claims

41 | What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

Under Thai law, there is no specific remedy for pension-related claims against employers in insolvency proceedings.

Environmental problems and liabilities

42 | Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The BA does not specifically impose additional responsibilities or liabilities on the official receiver, interim executive, plan preparer, plan administrator, the debtor's officers and directors, or any third parties.

Liabilities that survive insolvency or reorganisation proceedings

43 | Do any liabilities of a debtor survive an insolvency or a reorganisation?

In bankruptcy proceedings, the liabilities of the debtor will survive the proceedings in two cases: discharge from and termination of the bankruptcy.

The debtor can be discharged from the bankruptcy in two different ways: discharge from bankruptcy according to a court's order; and discharge from bankruptcy after the lapse of a three-year period as prescribed in the BA. An order of discharge from bankruptcy will not relieve the debtor from debts related to tax or land tax and debts that have arisen through the dishonesty or fraud of the debtor, or debts for which creditors have not filed claims owing to dishonesty or fraud to which the debtor is a party.

If the bankruptcy is terminated by the court because of the creditors' failure to cooperate with the official receiver, the debtor will not be relieved from its liabilities.

In reorganisation proceedings, the debts incurred prior to the making of the court's reorganisation order, which had been applied for repayment, will be released after the implementation of the plan. After the making of the order to terminate the reorganisation, the debtor will be freed from

all debts for which repayment could have been applied in reorganisation proceedings. However, if the court cancels the reorganisation proceedings, all remaining debts that have not yet been repaid will remain.

Distributions

44 | How and when are distributions made to creditors in liquidations and reorganisations?

In bankruptcy proceedings, once the assets of the debtor are sold, distribution will be made to creditors who have been granted the court's final order to receive repayment of debts.

In reorganisation proceedings, distributions will be made according to the reorganisation plan that has been approved by the court.

SECURITY

Secured lending and credit (immovables)

45 | What principal types of security are taken on immovable (real) property?

Under Thai law, security can be created over immovable (real) property by way of mortgage under the Civil and Commercial Code (the CCC), and by way of a business security agreement under the Business Security Act BE 2015 (the BSA). The only immovable property that can be subject to a business security agreement is land on which the security provider operates the business of immovable property directly (ie, development land owned by a property developer).

Under the CCC, a mortgage must be made in writing and registered with the competent authority. The CCC also prescribes certain details that must be specified in the mortgage agreement; for example, the amount secured (which, for immovables, is required to be in Thai baht) and details of the secured obligations. A title document in respect of mortgaged property is not required to be delivered to the mortgagee in order to perfect a mortgage. However, in practice, original land title deeds of mortgaged properties are usually required to be in the possession of the mortgagee throughout the term of the mortgage agreement.

The same asset may be subject to several mortgages in favour of several mortgagees (which have different rankings depending on the time of registration of the mortgage); the first registration of the mortgage is considered as the first in priority, and the first mortgagee will be entitled to receive repayment in priority over the second or subsequent mortgagee. A creditor who takes a mortgage is regarded as a secured creditor under Thai bankruptcy proceedings under the Bankruptcy Act.

The security receiver under a business security agreement must be a financial institution or any other person prescribed in a ministerial regulation.

Secured lending and credit (movables)

46 | What principal types of security are taken on movable (personal) property?

Certain movable assets may be mortgaged: examples are ships of five tonnes and over, floating houses, beasts of burden; and in addition, any other movable properties with regard to which the law may provide registration for that purpose such as machinery that is registered with the Central Office for Machinery Registration, the Department of Industrial Works in Thailand under the Machine Registration Act BE 2530, or any movable assets that can be mortgaged under a specific law, or ships of sixty tonnes gross or over for the purpose of a sea voyage can be mortgaged under the Mortgage of Ships and Maritime Lien Act BE 2537.

Pledges under the CCC may be taken over movable property, which require delivery of the property to the creditor or its agent to perfect the

pledge (examples would be shares and debt instruments). If the debtor needs to retain possession of the property for its business, a pledge will not be possible. While strictly not a pledge, security in the nature of a pledge can be taken over scrippless (uncertificated) shares and debt securities.

Business security under the BSA can be taken over the following property:

- a business;
- a right of claim (which includes a right to receive performance of obligations and any other rights, but excludes a right represented by a written instrument);
- movable property used in a business such as machinery or inventory;
- intellectual property; and
- other assets as prescribed by a ministerial regulation.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

47 | What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Upon the written petition of the official receiver (in the case of bankruptcy) or the plan preparer, a plan administrator or the official receiver (in the case of reorganisation), the court may order cancellation of the following transfers:

- transfers of assets or transactions (or both) involving assets of the debtor carried out with the debtor's knowledge that it will prejudice creditors (except in the event the relevant beneficiary is not aware that such act or transaction would prejudice the debtor's creditors) (fraudulent transfer); or
- transfers of the debtor's assets that intentionally provide preference to one or more of its creditors over other creditors, which are made in the three-month period prior to the commencement of proceedings under the Bankruptcy Act or, in the event the creditors granted the preference are insiders, within one year prior to the commencement of the proceedings (preferential transfer). 'Insider' is defined as, inter alia, a director, a shareholder holding more than 5 per cent of the total number of the issued shares of the debtor, and their spouses and minor children.

There is a rebuttable presumption that the debtor and the beneficiary are aware that the transfer or act would prejudice the debtor's creditors, and thus is a fraudulent transfer, if the relevant transfer or act was made in the year before the filing of a bankruptcy petition or reorganisation petition, as the case may be; or the transfer was gratuitous or a transfer from which the debtor received an unreasonably small amount.

Equitable subordination

48 | Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Under Thai law, there is no specific restriction barring related parties or non-arm's-length creditors from claiming for debt repayment in insolvency proceedings.

GROUPS OF COMPANIES

Groups of companies

- 49 | In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Under Thai law, the doctrine of separate legal entity is strictly upheld. Hence, a parent or affiliated corporation can be held responsible for the liabilities of subsidiaries or affiliates only in the event that such parent or affiliated corporation has guaranteed the entity's debts or where it has made itself a co-debtor with its subsidiaries or affiliates.

Combining parent and subsidiary proceedings

- 50 | In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Under Thai law, there is no procedure for combining the parent company and its subsidiaries, and so none of the assets and liabilities can be pooled for distribution purposes.

INTERNATIONAL CASES

Recognition of foreign judgments

- 51 | Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Foreign judgments are not recognised in Thailand, though may count as evidence in Thai proceedings. Thailand is a party to the New York Convention 1958, so foreign arbitration awards may be enforced in Thailand, subject to the Arbitration Act BE 2545 (2002).

Thailand is not a signatory to any treaties on international insolvency or on the recognition of foreign judgments. Foreign judgments or orders with respect to insolvency proceedings in other countries are not recognised under Thai law.

UNCITRAL Model Law

- 52 | Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Thailand has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. Adoption has been under consideration for a number of years but no progress is expected in the short to medium term.

Foreign creditors

- 53 | How are foreign creditors dealt with in liquidations and reorganisations?

In bankruptcy proceedings, under section 178 of the Bankruptcy Act (the BA), foreign creditors who are domiciled outside Thailand can claim for repayment of debts if the creditors can prove that creditors in Thailand can file for debt repayment in bankruptcy proceedings in the foreign creditors' jurisdiction, and foreign creditors have to agree to contribute any recoveries from the debtor's assets outside of Thailand to the debtor's pool of assets in Thailand.

In reorganisation proceedings, the foreign creditors can file for repayment and receive repayment under the plan in Thailand.

Cross-border transfers of assets under administration

- 54 | May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

A foreign bankruptcy or order for control of a debtor's estate has no effect on the debtor's assets in Thailand. Thai law does not provide for cross-border transfers of assets under administration.

COMI

- 55 | What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

COMI is not a concept used in Thai law. Accordingly, there is no test or any experience with determining the COMI of a corporate group of companies in Thailand.

Cross-border cooperation

- 56 | Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Under Thai laws, there is no legislation providing cross-border cooperation. Therefore, according to section 177 of the BA, a foreign bankruptcy or order for control of a debtor's estate has no effect on the debtor's assets in Thailand.

Thailand is not a signatory to any international treaties on insolvency or the recognition of foreign judgments.

Cross-border insolvency protocols and joint court hearings

- 57 | In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

No.

Winding-up of foreign companies

- 58 | What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

A foreign company could be wound up in bankruptcy proceedings if the Thai courts have jurisdiction over the company. If the business of the company has been conducted in Thailand, whether by the company or its representatives, at the time a petition for bankruptcy is made against the company, or has been during the previous year, according to section 7 of the BA, the Thai courts will have jurisdiction.

However, pursuant to section 177 of the BA, the winding up of a foreign company via bankruptcy proceedings will only involve the company's assets located in Thailand.

UPDATE AND TRENDS**Trends and reforms**

- 59 | Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

In the rehabilitation proceedings for Thai Airways, the official receiver is considering shifting the voting and submission of debt repayment claims online, or to an app.

Coronavirus

- 60 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns?

The Bank of Thailand has encouraged financial institutions to exercise restraint with defaulting debtors. However, no insolvency law has been changed to deal with the situation.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Thailand	
Applicable insolvency law, reorganisations: liquidations	Bankruptcy Act applies to bankruptcy and reorganisations
Customary kinds of security devices on immovables	Mortgages and Business security under the Business Security Act in the case of developer's land
Customary kinds of security devices on movables	Mortgages of certain movables which are capable of registration, pledges on property which can be delivered to the creditor or its agent, and business security under the Business Security Act
Stays of proceedings in reorganisations/liquidations	Yes in reorganisations from the time of acceptance of the petition by the court until, in summary, the completion of the plan or the termination of the reorganisation; No in bankruptcy proceedings though the Official Receiver handling the bankruptcy may apply to the court for proceedings to be stayed
Duties of the insolvency administrator	In bankruptcy, to realise the assets of the insolvent; in reorganisation, to carry out the plan approved by creditors and the court
Set-off and post-filing credit	Set off is possible at the option of the creditor in both bankruptcy and reorganisation: post filing credit is not possible in bankruptcy and only possible in reorganisation with the approval of the court
Creditor claims and appeals	Creditors must file claims within two months of the publication of the receivership order, in the case of bankruptcy, and one month of the publication of the identity of the plan preparer, in the case of reorganisation proceedings. A creditor can appeal to the court, and then court of appeal and supreme court, if its claims are disclaimed.
Priority claims	Secured creditors, Official Receiver's expenses, expenses of reorganisation, taxes due in the last six months, and amount owing to employees for four months
Major kinds of voidable transactions	Fraudulent transactions and preferences
Operating and financing during reorganisations	During a reorganisation the business of the company must be carried on in the ordinary course unless the court approves otherwise or the transaction is part of the reorganisation plan
International cooperation and communication	None
Liabilities of directors and officers	None
Pending legislation	None

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